

Salt & Light

Fall 2006

The Newsletter of the Social Concerns Ministry Team

Educating and informing the church body in light of biblical principles

You are the salt of the earth...
You are the light of the world...

Mt. 5:13-14

Editorial Note:

Many observers of U.S. society have expressed worries recently about the increasing incidence of "judicial activism". This refers to the tendency of some judges in the United States to make decisions that set new directions for society which ought to be democratically determined instead by the people. The present issue of *Salt & Light* examines this situation in several ways. The first article explains what judicial activism is. The second provides numerous illustrations of this tendency and explains how the United States was originally structured in order to guard against it. In order to gain some biblical perspective on the godly role of judges, the third article then examines biblical criteria for good judges. The newsletter concludes with some practical suggestions regarding how we can best respond once we recognize the problem of judicial activism. Throughout appear boxed quotes illustrating how prominent U.S. Presidents and Supreme Court Justices have viewed this problem and reminding us why engaging this challenge is so important: The only thing necessary for the triumph of evil is for good people to do nothing.

What is Judicial Activism?

From: dictionaries and www.family.org

According to *Black's Law Dictionary*, judicial activism is "a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent."

According to *Merriam-Webster's Dictionary of Law*, judicial activism is "the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to supposed constitutional or legislative intent".

For example, when a court "finds" a "right of privacy" hidden in the "penumbras" and "emanations" of the Constitution (*Griswold v. Connecticut*), and later expands this "right of privacy" into the right to abortion (*Roe v. Wade*); that's judicial activism. Here are some other examples:

- When a court rules that the First Amendment ("Congress shall make no law ...") suddenly means that "the states shall make no law" and creates a new constitutional "wall of separation" between church and state (*Everson v. Board of Education*);
- When a court rules that "evolving constitutional

standards" mandates a right to same-sex marriage, contravening 200 years of state law and centuries of tradition (*Goodridge v. Dept. of Public Health*).

The proper role of a judge is to be an umpire. A baseball umpire calls balls and strikes, but doesn't change the rules of baseball in the

"To consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men and not more so. They have with others the same passions for party, for power, and the privilege of their corps...their power the more dangerous as they are in office for life and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves."

—President Thomas Jefferson
to William Jarvis

process. Applying the analogy, a judge (umpire) applies the law (rules of baseball) to the facts of a particular case (a pitch, a runner tagged out, a fly ball caught or missed) to arrive at a judgment (strikes, outs, foul balls, etc.).

Example: A jury finds that Joe

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Prior issues of *Salt & Light*: www.wbc.org (Adult Ministries)

Examples and Limits of Judicial Activism

From: Richard Lester, *The Washington Times*

In California, the U.S. 9th Circuit Court of Appeals found the Pledge of Allegiance unconstitutional because it refers to "One Nation, Under God," allegedly violating the First Amendment's "establishment clause."

In Florida, the state supreme court threw out a law requiring parents of minor girls to be notified before their daughters obtain an abortion, this despite overwhelming public support for such a common-sense provision.

Although voters in Nevada twice in the 1990s passed an amendment to the state constitution calling for a two-thirds supermajority of the legislature to pass any tax increase, the Silver State's supreme court ordered legislators to pass a \$1 billion tax increase by a simple majority. This ruling effectively disenfranchised the voters of Nevada, stood the constitution on its head, and made a mockery of popular self-government....

In *Lawrence vs. Texas*, the Supreme Court kicked open the door, as Justice Antonin Scalia noted in his scorching dissent, to legalized same-sex marriage, polygamy and other unconventional relationships,

thereby setting up a revolution in social norms despite the unwillingness of the American people to undertake such an upheaval. Any day now the Massachusetts Supreme Court is expected to legitimize same-sex marriage. [Note: This has occurred]

These and other outrageous cases — will we soon forget the U.S. Supreme Court rewriting the rules of golf for the PGA? — suggest our American system of separated powers, checks and balances, is

government. Federalist 78 by Alexander Hamilton contains not so much as a hint that the courts constitute the supreme branch of government or that judicial rulings irrevocably settle issues in dispute. Such a notion of unaccountable, unanswerable, unfettered judicial power does violence to the whole notion of separated powers.

The Framers limited the power of the courts just as they did the powers of the other two branches of government. Not only can the people amend the Constitution, but the Congress also can limit the courts' jurisdiction under the Constitution's "exceptions clause" in Article III, Section 2, putting specific matters beyond the reach of grasping judges (Federalist 81, also by Hamilton).

Thomas Jefferson refused to enforce the Alien and Sedition Acts even though the Supreme Court held those egregious laws to be constitutional. And Abraham Lincoln refused to abide by *Dred Scott*, holding that the court's rulings were binding only upon the immediate parties to the case. As Lincoln noted, if the Supreme Court's decisions irrevocably resolve issues, the people will have ceased to be their own rulers and resigned their government into the hands of judges. †

"Somebody has to reverse that decision and we mean to reverse it. If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decision of the Supreme Court... the people will cease to be their own rulers, having to that extent practically resigned their government into hands of that eminent tribunal."

—President Abraham Lincoln on the *Dred Scott* Case

seriously out of balance....

The notion of judicial supremacy, that the court has the final say on the meaning of the law and Constitution, is nowhere to be found in the thoughts of the Framers or the text of the Founding document. It is a power the courts have arrogated to themselves over time with little resistance from the legislative or executive branches of

Further Examples and Citations:

- ◆ Blacks were not considered persons, but property and thus could not be citizens (*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 1857)
- ◆ Blacks separate but equal (*Plessy v. Ferguson*, 163 U.S. 537 1896)
- ◆ Right to abortion (*Roe v. Wade*, 410 U.S. 113 1973)
- ◆ Enacting a "wall of separation between church and state" (*Emerson v. Board of Education*, 330 US 1 1947)
- ◆ Banning nondenominational prayer from public schools (*Engel v. Vitale*, 370 US 42 1, 435 n.21 1962)
- ◆ Banning Bible reading from public schools except for comparative religion and history study (*Abington Township v. Schempp*, 374 US 203, 304 1963)
- ◆ Striking down a state's choice not to teach the evolution of humans (*Epperson v. Arkansas*, 393 US 97 1968)
- ◆ Removing the Ten Commandments from public school walls (*Stone v. Graham*, 449 US 39 1980)
- ◆ Striking down " a period of silence not to exceed one minute ... for meditation or voluntary prayer" (*Wallace v. Jaffree*, 472 US 38 101-102 1985)
- ◆ Censoring creationist viewpoints when evolutionist viewpoints are taught (*Edwards v. Aguillard*, 482 US 578 1987)
- ◆ Barring prayers at public school graduations (*Lee v. Weisman*, 112 S. Ct. 2678, 2683-84 1992)

Biblical Criteria for Good Judges

From: Bill Haynes, American Center for Law & Justice

In the early days after the exodus of the Israelites from Egypt, Moses realized that the burden of hearing all the issues himself was simply impossible. His father-in-law made the suggestion that he select men with certain qualities and place them in charge of various groups determined by size. Some would be over thousands, some over hundreds, some over fifties, and some over tens. This would provide a system for handling the cases based on importance and credence. This is similar to our trial courts, appellate courts and Supreme Court.

In making these appointments there were three basic qualifications that were required: (1) that they fear God, (2) that they are men of truth, and (3) they must hate dishonest gain. These qualifications were simple but they were of utmost importance.

The first, that they fear God, would give them the courage they would need to decide very difficult cases. If their fear was that they would not please man then they would be unable to do the right thing in each case. But to fear God is to know that they are fallible and to focus on doing what is right in the eyes of God

and carrying out true justice....

This is not to establish some type of religious test for judges, which is forbidden in Article VI Section 3 of the Constitution of the United States. There should be no consideration as to whether a person is Jewish, Christian, etc. Rather it is simply an

the people.

The second basic qualification is that they are to be men of truth. Truth, of course, must be the basis for justice. Without it there will be no justice at all. This too was a major concern throughout all of scripture for all people but especially for those who would

serve to judge others....

Isaiah said, "woe to those who call evil good, and good evil; who substitute darkness for light and light for darkness" The emphasis is on the fact that judges are to "call it as it is" - not as he, or others, would like for it to be. To call evil good and good evil is to totally pervert the nation and the system that has

"What I am questioning is the propriety, indeed the sanity, of having value laden decisions such as these made for the entire society - and in the case of Europe for a number of different societies - by judges. Nothing I learned from law courses here at Harvard, none of the experiences I acquired in practicing law, qualifies me to decide whether there ought to be a fundamental right to abortion or assisted suicide."

—Supreme Court Justice Antonin Scalia to Harvard University

acknowledgement of what Solomon said in Proverbs 9:10 - "The fear of the LORD is the beginning of wisdom" It is recognizing that there is an authority that is greater than he or she.

It is made clear in Deuteronomy 10:20 that there is to be only one focus for the judge: "Justice, and only justice, you shall pursue." The judge should not push his own political agenda but should interpret the law in a fair way that brings justice to the land and to

been set up to carry out true justice. Men and women who do not have a basic respect for life and liberty have no business serving in the courts of our land.

The final basic qualification is that "they hate dishonest gain." The judges are to demonstrate integrity in every area of their lives. With this qualification Isaiah clearly puts the emphasis on doing justice. We must have judges whose role focuses on the pursuit of justice for all the people. †

"The only thing necessary for the triumph of evil is for good men to do nothing."

—Philosopher Edmund Burke

What You Can Do

From: Tom Clark and the Social Concerns Ministry Team

1. **Be informed.** Have you ever read the actual United States Constitution and the Declaration of Independence? Be acquainted with these and with the judicial process. See www.u-s-history.com/pages/h976.html and www.abanet.org/media/factbooks/judifact.pdf.

2. **Work to defend and uphold our Constitution.** Work with

those who can assist you to defend and uphold our Constitution. Support judges committed to defending the Constitution and not adding to it.

3. **Know the political process.** Do you know your State legislators, your Federal legislators, and those who are elected or appointed to represent you? They are your servants and you are re-

sponsible to know what your servants are doing. Your vote is one way to hold them accountable.

4. **Pray for judges regularly.** Include judges at various levels, but especially the Supreme Court judges, that they may be able to live out the biblical criteria for good judges reviewed here. †

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What is Judicial Activism?

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Smith robbed a bank on a certain date. The judge then applies the rules, i.e., a criminal statute passed by the legislature, to arrive at a judgment, i.e., jail time. Appellate court judges review cases to determine that the trial judge applied the law correctly. Sometimes courts are asked to examine the law itself to ensure that it does not run afoul of the Constitution in any way.

Judicial activism occurs when a judge wants to change the rules of the game, a constitutionally granted responsibility that belongs only to the legislature. For example, prior to 1973, abortion laws were left up to the states to decide for themselves, as an exercise of each state's "police power." In the 1973 *Roe v. Wade* decision, however, the Supreme Court, building upon the judicially created "right of privacy"

announced in its *Griswold* decision several years earlier, created a new right to abortion on demand applicable to all 50 states. What had been the sole prerogative of the states' legislatures was now pre-empted by a judicially created federal mandate, unappealable and unchallengeable except for a Constitutional amendment. Courts (especially the Supreme Court) have engaged in changing the rules (i.e., making law from

the bench) at various times in our nation's history, but in the last 50 years the pace of judicial activism has increased alarmingly....[As John Roberts, current Chief Justice of the Supreme Court, has stated:] "In our democratic system, responsibility for policy making properly rests with those branches that are responsible and responsive to the people....Judges must be constantly aware that their role, while important, is limited." †

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